88-1283

Supreme Court, U.S.
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Case No. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1988

H. GARY WELLS, Petitioner,

v

GREGORY LENT, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

LARRY J. BURDICK
ISABELLA COUNTY PROSECUTING ATTORNEY
Attorney for Petitioner
200 N. Main
Mt. Pleasant, MI 48858
(517) 772-0911

QUESTION PRESENTED

1. WHETHER THE PROSECUTOR'S REMARKS DURING CLOSING ARGUMENT THAT THE EVIDENCE WAS "UNCONTRADICTED" WAS AN UNCONSTITUTIONAL REFERENCE TO RESPONDENT'S ELECTION NOT TO TESTIFY?

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Petitioner, H. Gary Wells, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered November 22, 1988.

OPINIONS BELOW

The Opinion of the Court of Appeals (App A, infra, A-1) is not yet reported. The Judgment of the District Court was not reported; the District Court's Opinion is found in Appendix B, at B-1 to B-10. The Michigan Supreme Court denied Respondent's Delayed Application for Leave to Appeal. The Order of the Michigan Supreme Court is found in Appendix C, at C-1 to C-3. The Michigan Court of Appeals affirmed Respondent's conviction in a Per Curiam Opinion. The Opinion of the Court of Appeals is found in Appendix D, at D-1 to D-7.

JURISDICTION

The judgment of the Court of Appeals (App A, A-1 to A-37) was entered on November 22, 1988. This Petition for

Certiorari was filed within sixty days of that date. This Court's jurisdiction is invoked under 28 USC Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

1. United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT

Respondent, Gregory Lent, hereinafter Respondent, was charged with and convicted of Criminal Sexual Conduct in the first degree, MCL 750.520b(1)(f), and upon his plea of guilty as a third felony offender, MCL 769.11(1)(b). Respondent was thereafter sentenced to a term of 10-15 years imprisonment.

Thereafter, Respondent appealed his conviction as of right to the Michigan Court of Appeals, which affirmed in a Per Curiam opinion. People v Lent, No. 76339 (September 18, 1985). The Michigan Supreme Court thereafter denied Respondent's delayed application for leave to appeal. People v Lent, No. 77459 (April 28, 1986).

Respondent thereafter sought habeas corpus relief in the Eastern District of

Michigan. On October 19, 1987, the Honorable James P. Churchill issued his Memorandum Opinion and Order (hereinafter Mem Op) denying habeas corpus relief (No. 86-CV-10387-BC). On November 22, 1988, the United States Court of Appeals for the Sixth Circuit granted the request for a writ of habeas corpus. (No. 87-2121).

On the evening of August 5, 1982, (T-222), nineteen year old Pamela Thering, (Id), the victim, accompanied by two friends, (Id.) went to the Wayside Bar in Mt. Pleasant, Michigan. Despite being underage, she gained admission (T-223) to the bar and began drinking beer. During the evening she encountered her friend, Sandy Mankowski (T-225), who told her she had been invited to a party and wanted Ms. Thering to accompany her (T-225, 297). Ms. Thering had driven to the bar in her

family's Chevy Suburban motor vehicle (Id).

While at the bar she was introduced to Respondent (T-230). As she and her friend, Ms. Mankowski, left the bar and headed for her vehicle to go to the party, a decision came about whereby Respondent accompanied Ms. Thering in her vehicle while Ms. Mankowski accompanied a person named "Vinny" in Respondent's vehicle (Id, T-232).

Respondent and Ms. Thering drove around attempting to locate the party. They subsequently called the Sheriff trying to locate the street where the party was supposedly taking place. On his return to the vehicle, Respondent advised the location was 10 miles north of town (T-233). With Ms. Thering driving (T-232), they drove until they located

Vernon Road, then drove up and down it but did not find the party (T-234).

When they were unable to locate the party, Ms. Thering said she was tired and wanted to go home (T-235). She agreed to drive Respondent home. (Id). Respondent directed her to an abandoned farm house (T-237, 239). Respondent directed her to park in the driveway (T-239). The grass was long, the house beat-up and it appeared no one lived there (T-240). Respondent said he did not like to mow the lawn and was not there very often (T-241). Respondent asked her to go in the house (Id), she refused (Id). He said he did not live there (T-242). Ms. Thering again agreed to take him home (T-242), but would not take a walk with him (Id).

Respondent kissed the victim twice while at the abandoned farm (T-243) and they had previously kissed earlier when

they had stopped along the road so Respondent could go to the bathroom (T-234). No other contact took place (T-243).

During the period Respondent and Ms. Thering were at the abandoned farm, Respondent took possession of the keys to the Suburban (T-244). While out of the car Ms. Thering ripped Respondent's shirt while trying to gain possession of the keys (Id). Ultimately, Ms. Thering agreed to let Respondent drive her car so she could leave the location (T-245).

En route along Lincoln Road (T-246), Respondent stopped the car and lit a cigarette (T-247). When he put it out, he slid across the seat to her (Id). He tried to kiss her again (Id). She resisted (Id). They wrestled (Id). She opened the passenger door (Id); they fell out of the vehicle (Id, T-248). She

landed on her back, he was on top of her (T-248). He tried to kiss her (Id) they wrestled on the ground (Id). Respondent inserted his tongue into Ms. Thering's mouth, and she bit it (T-248, 249). Respondent tried to undo her pants, trying to get them off her (T-249). She yelled to leave her alone; he told her to shut up (Id). He pulled her pants off and threw them in the car (T-250). Ms. Thering tried to run (Id). Petitioner grabbed her feet, tripped her, and he fell onto her (Id).

Ms. Thering said she was hysterical and scared to death (T-251). Ms. Thering was a virgin (T-252). She struggled with Respondent when he tried to insert his penis in her vagina (Id). Finally, she consented to his demand for oral sex in order to avoid the further infliction of physical punishment on her (T-251-253).

After Respondent ejaculated (T-253) he did his pants up, said he had to go to the bathroom, and left (Id). Ms. Thering remained in the car, unable to start it because the keys were missing (T-254). She cried (T-255).

A motorcycle came by and she waived it down (Id). She told them she had been raped (Id); they left (Id). A short time later Michigan State Police Troopers arrived (T-256). They took her to the hospital (Id), where she had a pelvic examination (T-257).

Ms. Thering testified her earrings were gone and one ear was ripped and bloody (Id). There was blood on her clothing (Id), and bruises on her arm, face and body (T-262, 264, 266). Ms. Thering testified to emotional upset since the assault (T-269).

Ms. Thering's testimony regarding the decision to go to the party was corroborated by Ms. Mankowski (T-295, 296), including the decision on how the group was going to drive there (T-297, 298, 300). She confirmed Ms. Thering's unbloodied appearance before leaving with Respondent (T-301) and the absence of blood on her clothes, or bruises on her body (T-301, 302). She confirmed seeing Ms. Thering's swollen face and bruises the next day (T-302).

Randy Claybaugh (T-311-321) and his friend, Dan Recker (T-321-327) observed a male individual wearing no shirt walking down the highway about 4:00 a.m. (T-312). After passing him they came upon a Suburban motor vehicle (T-313). A girl was yelling something out the window (Id). They stopped, she was crying and upset (T-314), she told them she had been raped

(Id). They told her to roll up the windows and lock the doors (Id). They looked for the male without a shirt they had just seen, but could not find him (Id. T-315); they called the police (T-315).

Troopers Krafft and Martin responded to the scene (T-331). The weather was cold (T-332). Trooper Krafft found Ms. Thering's purse under the weeds (T-333). They took Ms. Thering to the hospital (T-334). Trooper Krafft observed that Ms. Thering's emotional state fluctuated, at times she cried; at times she appeared angry; at times she had a hard time catching her breath (Id). She appeared quite upset (Id). Ms. Thering told police she had been raped (T-341); Ms. Thering told police the person with whom she had been had a driver's license with the name Greg Lent on it (T-337). The troopers also investigated the scene (T-338),

looking around the vehicle (Id). Trooper Martin noticed the grass in a 6 by 10 foot area had been matted down (T-342). He observed that it seemed to be "an awful (sic) large area" (Id).

Post Miranda statements which Respondent made to Trooper Siuda were introduced. Respondent's story matched the victim's to the point of the abandoned farm. There, Respondent said the couple "made out" (T-349). He said Ms. Thering was tired of driving and wanted him to drive (Id). En route they stopped again in order to continue "making out" (Id). They got out of the vehicle (Id). He wanted to have intercourse (Id). She declined (Id). Back in the vehicle she agreed to give him oral sex (T-350). Respondent told Trooper Siuda that there was no force involved at any time or in any way for these activities (Id).

Petitioner denied that any activity occurred which would cause injury to Ms. Thering (Id), or that he abused her at any time (T-351). Respondent denied any knowledge of how Ms. Thering could have been injured (T-351).

Next the prosecution produced testimony from Michael Wolner, a Michigan State Police Laboratory Specialist who conducted an examination of a swabbing of Ms. Thering's mouth in order to determine the presence of semen or spermatozoa (T-359). He testified that as in the majority of cases where oral sex is reported, this specimen disclosed no semen or spermatozoa in the swabbing taken of Ms. Thering's mouth (Id).

The testimony in the case concluded with Dr. John Raymond, M.D. Dr. Raymond examined Ms. Thering at the hospital where she was taken by the State Police (T-364).

He performed a complete exam of her (T-365). He observed a scrape on her right cheek (Id), saw no bruises (Id), saw blood on Ms. Thering's clothing (Id). He observed Ms. Thering to be mildly upset at the time of his examination, and appeared to have been crying (T-366). Medical testimony corroborated her hymen was intact (T-366, 369).

The defense presented no testimony, relying on the theory it announced during its opening statement. There Respondent's trial counsel told the jury his twofold theory of the case: first that the prosecution would "not have enough evidence to convince each and every one of you beyond a reasonable doubt that Greg [i.e. the Respondent] is guilty of this charge." (T-212) (emphasis added). Trial counsel reiterated that "[t]he prosecutor is not going to have enough evidence to

convict, to convince each one of you beyond a reasonable doubt to a moral certainty that Greg [i.e. the Respondent] is guilty of what he's charged with." (Id, T-213) He told the jury that the sole evidence against his client would come from the victim, Ms. Thering (T-213). He told the jury: "[y]ou will have no other, what we call, corroborating evidence." (Id) Respondent's counsel told the jury the prosecutor will have "no eyewitnesses" (Id). No other direct or circumstantial evidence other than the testimony of the victim (Id), and no medical or expert testimony to show a sexual assault occurred (Id).

Trial counsel related that evidence will show that the victim was an underage drinker at the bar that night (T-214). That she and her friend had several drinks (Id). He admitted Respondent and his

friend were also at the bar (Id), and that they all left together around closing time (Id). The parties heard about a party "somewhere on Vernon Road or Vernon Street" (Id); no one knew exactly where it was (Id), or who was hosting it (T-215). They all decided to go (Id). He stated evidence would show that Respondent and Ms. Thering attempted to find the party (Id), but were confused about its location (Id) and that Respondent then suggested and did stop to make a phone call to the Sheriff's Department for directions (T-215, 216). He told the jury that during the evening, and on more than one occasion, while searching for the party, "there was some kissing, petting, making out of (sic) whatever you want to call it" (T-216). He stated it was voluntary and that both parties presumably responded (Id). He told the jury that:

"Now they were either continuing their search for the party, or they were taking Greg home, who lived just a few miles down on Lincoln Road. Well, the evidence will show that they parked the car, and that their petting, making out or whatever was removed to outside of the car onto the grass. The evidence will show that Greg's advances became a bit persistent, persistent to the point that Miss Thering, and she testified to his, she bit Greg's tongue so hard that it bled. At that point Greg, probably feeling the effects of the alcohol, as was Miss Thering, overreacted and struck, slapped Miss Thering one time across the right cheek. Following that a scuffle ensued between the two. That is possible when the earring -- the injury to the ear. Following the scuffle Greg got up, and he proceeded to walk along Lincoln Road towards his home. That, ladies and gentlemen, is the other side of the story, the other side of the coin if you wish. What I've just narrated to you is what the evidence is going to show you beyond a reasonable doubt. That's what clearly the evidence will show. Now if you find guilt in some of Greg's behavior from what I've just described, you will return a verdict accordingly. We will be asking you to only return a verdict that is substantiated by the evidence, to return a verdict

> that is established beyond a reasonable doubt, not the terrible crime that Greg is charged with."

Thus Respondent announced the second prong of his theory of defense, ie. we are guilty of something, and asked the jury to return a lesser verdict, although not the one with which Respondent is charged (T-217).

Finally, Respondent's attorney told the jury that after leaving Ms. Thering at her vehicle, Respondent walked along the highway toward his house. He did not duck (Id) or jump in the woods (Id) or try to avoid being seen (Id) by the two men on the motorcycle who passed by (Id). He pointed out the facts as well as the fact that Respondent showed Ms. Thering his driver's license were acts inconsistent with Respondent's guilt (T-218). He suggested the story of the victim may be

exaggerated to the point it was beyond being retracted or taken back (Id). He concluded by telling the jury that:

> "So in conclusion, ladies and gentlemen, when it's over we're going to ask you to return a fair and just verdict. That verdict may be guilt. That's correct, ladies and gentlemen. You have before you a defense attorney who said guilty. But if it is guilty, we are going to ask you to at least return a verdict that is substantiated by the evidence, a verdict that is established beyond a reasonable doubt, and not his horrible crime that Greg is charged with. Thank you very much."

REASONS FOR GRANTING THE PETITION

The Court of Appeals held as a matter of Federal Constitutional Law that the prosecutor improperly commented on Respondent's right not to testify in his own behalf when he commented that there was lack of evidence contradicting the complainant's testimony. Consideration by this Court is necessary because a Federal Court of Appeals has decided an important question of federal law which should be examined by and settled by this Court.

Respondent cited five instances to support his contention of improper and unconstitutional reference by the prosecutor to his failure to testify. In each instance Respondent complained about the prosecutor's reference to the fact that the prosecutor's evidence was uncontradicted, that the defense is based

on speculation and that "could have" did not take the stand, that the victim's claim that she was raped was not contradicted, that Respondent raped the victim is uncontradicted and unrebutted; what the victim said is uncontradicted and its backed up by other evidence.

This is an habeas corpus appeal, not a direct appeal. Therefore, inquiry on this claim of improper argument is less stringent. United States v Hasting, 461 US 499 (1984). In analyzing claims of prosecutorial misconduct in closing argument, a distinction is drawn between a prosecutor's direct comment on the defendant's right not to testify and a comment which is indirect. Raper v Mintzes, 706 F2d 161, 164 (6th Cir, 1983). If the comment is direct, a conviction

will be reversed unless the error was harmless beyond a reasonable doubt. The Court of Appeals has previously said:

> "The fifth amendment provides that 'no person . . . shall be compelled in any criminal case to be a witness against himself . . . .' An important corollary to that right is that neither a prosecutor nor a trial judge may comment upon a criminal defendant's failure to testify. Griffen v California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).
>
> The rule set forth in Griffin applies to indirect as well as direct comments on the failure to testify. Cases involving direct comments pose little difficulty as the court must reverse unless the prosecution can demonstrate that the error was harmless beyond a reasonable doubt. . . Cases . . . involving indirect comments on the failure to testify are more troublesome . . . [W]e recently refused to adopt a per se rule that comments as to the uncontradicted nature of evidence violated Griffin even where the evidence in question could only have been contradicted by the defendant . . . . Rather, the court must conduct a 'probing analysis of the context of the

> comments,' [United States v.] Robinson), 651 F.2d [1188, 1197 (6th Cir.), cert. denied), 454 U.S. 875 (1981)], in order to determine '[w]hether the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.' Butler, [v. Rose], 686 F.2d [1163, 1170 (6th Cir. 1983) (en banc)]."

Id. 164-165. In the instant case the district court found the prosecutor's statements were not direct comments on the Petitioner's right not to testify.

In determining whether the arguments constitute an indirect comment on the Respondent's right not to testify, four factors must be analyzed: (1) whether the comments were "manifestly intended" as such and would not naturally and necessarily be taken as such by the jury, Butler v Rose, id, (2) whether the comments were isolated or extensive, (3)

whether the evidence of guilt was otherwise overwhelming, and (4) whether curative instructions were given and when. Hearn v Mintzes, 708 F2d 1072, 1077 (6th Cir, 1983). The reviewing court is to use a probing analysis of the context to resolve the issue. Raper, surpa; United States v Robinson, 651 F2d 1188 (6th Cir, 1981), cert den, 454 US 875 (1981). see Spalla v Foltz, 788 F2d 400 (6th Cir, 1986).

Petitioner submits that when these prosecutor's arguments are viewed in context of this trial the comments are clearly not "manifestly intended" to reflect on the Respondent's failure to testify. See Steele v Taylor, 684 F2d 1193, 1104 (CA 6, 1982), cert den, 460 US 1053 (1983). Here, Respondent's trial counsel told the jury that while the prosecution could only present the

testimony of the victim, the defense would show considerable facts and evidence from which the jury would question everyone's behavior. In addition, during voir dire Respondent's attorney laid the ground work for telling the jury Respondent would not testify (T-34-38). The court emphasized to the jurors that Respondent did not have to testify or present evidence (T-2, 8, 11, 12, 454, 455). see Lakeside v Oregon, 435 US 333 (1978). Further, the prosecutor treated Respondent's statements to Trooper Siuda as if he had testified to them from the witness stand (T-412, e.g. ["The defendant told the police story number two."]). Thus, given the whole record, it is clear that the prosecutor's argument was not manifestly intended to reflect the Respondent's silence nor were they of such a character that the jury

would naturally and necessarily take them as such.

This can be seen from portions of the prosecutor's closing argument to which Respondent has not drawn the court's attention. For example, at T-412, 413, the prosecutor argued:

> "The defendant told the police story number two. He says, yeah, we had sex, I wanted to penetrate her vagina, but she was a virgin and said she didn't want to so she agreed to perform oral sex with me. But there was absolutely no coercion or force involved. That's what Trooper Siuda testified to. the defendant was given his Miranda rights, and he chose to make a statement to the police officer. Again no contradiction of that, no other testimony. That's what the defendant said, and that's what the evidence shows you. So he says, the defendant says a few days after the crime, well, we had sex, but it was all voluntary. Remember Trooper Siuda specifically asked the defendant did you cause any bruises? Did anything you did involve pushing her, bruising her or anything like that? No, there was no coercion involved, nor force involved, no

violence involved. That's what the defendant claimed a few days after the crime."

It is also seen from the prosecutor's further argument, T-413-414:

"The defense attorney, he's got a third version for you. What he tells you the evidence is going to show is that what happened is the defendant tried to kiss the victim, she bit his tongue, the defendant slapped her around a little bit, and then he left. No sex was involved at all. He told you, by the way, that that was what the evidence was going to show. What he told you is not true because none of the evidence shows that there was no sexual contact involved, no sexual penetration involved. None of the evidence shows that. The defense attorney tried to make you think that that was what the evidence was going to show, but think, what did you hear from the witness stand? Did you hear anyting about the defendant not having sex with the victim and just leaving after he had assaulted her? What the defense attorney is trying to get you to do is an old tactic called admit the act, but deny the crime. What he's trying to get you to do is to come back with assault and battery, to say, well, yeah, maybe he slapped her around, but no sex. Why does he do that? Because he's

> got to explain why we had a doctor come in here who testified to observing physical injuries on the victim. Because he's got to explain the pictures that you can look at yourself that show the bruises on each of the defendant's (sic) arms, swollen face, the bruised right cheek. He's got to explain that. Boy, the defendant's original story, that doesn't explain it. So we've got to come up with a new story for the jurors. Except one thing, that new story is not supported by the evidence. The defendant himself admits penetration. He himself admits the penetration. So don't listen to what his attorney has to say."

It can also be seen from the prosecutor's response to Respondent's opening statement claim that there would be no circumstantial evidence to support the prosecutor's case (T-415-417):

> "There's lots of circumstantial evidence in this case. Again, the defense attorney said there wouldn't be any, but he was wrong again because there is. Let's talk about the circumstantial evidence. Number one, the victim told you that there was a struggle,that she was tackled, that she was pulled down, that she

was pushed out of the car and all this sort of thing. What circumstantial evidence is there of the struggle? Remember the State Police Troopers who went to the scene. One of the troopers told you that he saw a grassy, trampled down area, freshly trampled down, right by the car about six feet by twelve feet in area. He said he was quite surprised by that, because the area was so large. Who does that back up? The defendant's story that it was all voluntary to the police, or what the victim told you under oath in court? It obviously backs up what she told you here in court because if there was struggle the way she told it, it was over a rather large area. She was getting up, she was being pulled down, wrestling around and all that sort of thing. If they had just had voluntary sex, you might see a smaller area, and the officer wouldn't have been surprise, but he was surprised. Who does that back up? The defendant's claim to the police, or the victim's? One thing I asked you to listen for very carefully in opening argument was the location of the victim's purse. The defendant's story to the police, we got out of the car and had sex on the ground. When then, if this is all voluntary, does her purse turn up on the ground, matted -- underneath

> matted down grass? Again, if you're going to have sex outdoors, as the defendant wants the police to believe, how did the purse get out of the car? How does it get covered up by the matted down grass which is obviously caused by bodies pushing the grass down? Does it get out there because of voluntary sex? No. Let's get out of the Suburban, let's go lay down here in the grass and let's have some sex.

Indeed when Respondent argues that the prosecutor's argument that the defense was based on speculation and "could have" but did not take the stand as an example of the prosecutor's comment on Respondent's right not to testify, Respondent does not disclose that what the prosecutor is talking about is evidence which would tend to contradict how the victim acted. Such evidence could come from many, many sources including many prosecution witnesses. Instead their testimony circumstantially supported the

prosecution's theory of the victim's state of mind. None of the witnesses at trial testified that the victim "could have" acted differently than she testified.

The next example raised by Respondent is like the last. Respondent's apparent argument is that only he could have testified that Ms. Thering was soliciting sexual favors from her by her demeanor and behavior. Surely, other witnesses present at the bar could equally testify to whether Ms. Thering was "pretty blasted" (T-475), or "in the bag", (d) or "grabbing at the defendant when they left the bar" (Id). Clearly, Respondent was not the only witness who could testify to these things. A great many of the prosecution witnesses could have equally testified to these "facts" had they occurred.

Finally, Respondent pointed to the prosecutor's rebuttal statement commenting

on the credibility of Pamela Thering's testimony, i.e., the fact that it was supported by other evidence, and that there was no other evidence to contradict what she said.

In view of the context in which the argument was raised, it is clear that this was a response to Respondent's opening and closing arguments about his theory of the case and was not a comment on Respondent's failure to testify. Respondent virtually conceded his guilt to some crime in his opening and closing arguments, and the next sentence in the prosecutor's argument clearly shows that the argument is in response to defense counsel's argument about the lack of corroborating evidence (T-447, 448):

> "The defense attorney thinks if he says I haven't produced any corroboration often enough you folks might come to believe it. but do we have corroboration? Do

> we have evidence there was a struggle? He didn't want to talk about that, but you bet we do."

In this case, when looked at in context, the prosecution's statements were not an adverse comment on Respondent's right not to testify. The prosecution's arguments were in response to Respondent's theory and supporting argument. Wide latitude is given a prosecutor in rebuttal argument. Angel v Overberg, 682 F2d 605 (6th Cir, 1982). Although the reply doctrine serves only to permit neutralization of a defense argument and does not operate as a license for improper affirmative attack, United States v Elkins, 732 F2d 1280, 1288 (6th Cir, 1984), United States v Somers, 496 F2d 723 (3rd Cir, 1974), Cert den, 419 US 832 (1974); People v Wise, 134 Mich App 98 (1984), Lv den, 422 Mich 852 (1985), an

otherwise improper argument is mitigated if made in response to a defense argument. Cook v Bordenkircher, 602 F2d 117 (6th Cir, 1979), cert den, 444 US 936 (1979).

Consequently, Petitioner submits that when viewed in context, these challenged arguments were in response to Respondent's argument about a lack of corroboration and were not intended as a comment on Respondent's failure to testify.

In Steele v Taylor, 684 F2d 1193, 1205 (6th Cir, 1982), Cert den, 460 US 1053 (1983), the Sixth Circuit said: "where, in context, a prosecutor's comment is reasonably subject to an interpretation other than as a comment on the defendant's failure to testify, clearly curative instructions will ordinarily eliminate the error." Furthermore, as in Steele, during voir dire Respondent's counsel told the jury that Respondent need not testify, and

the court excused a juror who thought otherwise. During closing instructions, the trial court instructed the juror not only that counsels' arguments were not evidence (T-457) and that Respondent had the right not to testify (T-455) and that the jury was "not permitted to consider the defendant's silence in your deliberations, and his silence must not influence your verdict in any manner whatsoever. . . " (T-455).

The record thus shows that upon a probing analysis of the prosecutor's closing argument in this case, there was no constitutional error, but even if, arguendo, there was one, it would be harmless beyond a reasonable doubt. Chapman v California, 386 US 18 (1967).

The district court found that:

> "Although there were five alleged instances of prosecutorial comment on Petitioner's silence,

> the remarks were isolated and not overly extensive. Furthermore, the evidence of guilt was not weak and the court gave curative instructions as part of the ordinary jury instructions. see T. pgs. 454-455. Therefore the prosecutorial comments, viewed in light of their context, and considering the four Hearn factors, do not constitute a Fifth Amendment violation upon which habeas relief may be granted.

Given the facts and circumstances of this case, the District court properly resolved the constitutional claims raised. Habeas Corpus was properly denied by the District Court, and the Court of Appeals erred by granting the writ of habeas corpus. Petitioner believes that the decision of the Court of Appeals is out of line with the views presented by this Court in Lockett v Ohio, 438 U.S. 586 (1978), and United States v Robinson, 108 S. Ct. 864 (1988).

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that a Writ of Certiorari should issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

Larry J. Burdick

Larry J. Burdick
Isabella County Prosecuting Attorney
Attorney for Petitioner

DATE: Jan 17, 1989

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 87-2121

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GREGORY LENT,

Petitioner-Appellant,

v

H. GARY WELLS,

Respondent-Appellee.

On Appeal from the United States District Court for the Eastern District of Michigan.

Decided and Filed November 22, 1988

Before: WELLFORD and BOGGS, Circuit Judges; and PECK, Senior Circuit Judge.

PECK, Senior Circuit Judge, delivered the opinion of the court, in which WELLFORD, Circuit Judge, joined. BOGGS, Circuit Judge, (pp. 23-35) delivered a separate dissenting opinion.

PECK, Senior Circuit Judge. This is an appeal from the district court's denial of a petition for a writ of habeas corpus. Petitioner, Gregory Lent, was convicted of first degree criminal sexual assault by a Michigan jury, and he was sentenced to 10-15 years imprisonment. The Michigan Court of Appeals affirmed the conviction. The Michigan Supreme Court denied Lent's delayed application for leave to appeal.

The issue in this case, whether a criminal accused's privilege against self-incrimination has been violated by the State's indirect reference to his failure to take the stand, is an issue which federal courts too frequently face. Whether particular comments impermissibly accentuate the accused's failure to testify depends upon the context in which they are made. If they do, a reviewing court must consider whether the degree to

which the verdict might depend upon improper remarks is so slight as to constitute "harmless error." For the reasons set forth below, we conclude that the challenged remarks unconstitutionally denied petitioner his right to be free from compulsory self-incrimination, and that the error was not harmless.

I. Facts

In defense's opening statement, counsel asserted that the State would lack sufficient evidence to convict because no evidence corroborated the complainant's testimony, and because considerable evidence opposing complainant's testimony would be presented. What actually happened during the period at issue could only be known by the complainant and petitioner, whose opening statement

indicated that he intended to present evidence of his version of those facts.

The State presented several witnesses, including the complainant. It was established that petitioner had gone to a bar with a friend, where they met complainant and her friend. Complainant and her friend were drinking beer, though they were underage. The four decided to split up and search for a party they had heard of, with petitioner accompanying complainant in her car. Petitioner called the sheriff in an effort to locate the street where the party was supposedly taking place, but they were still unable to find it.

Complainant agreed to drive petitioner home. Petitioner directed her to an abandoned farmhouse and asked complainant to go inside. When complainant refused, petitioner admitted that it was not his

house. Complainant voluntarily kissed petitioner twice while at the farm.

Complainant testified that petitioner took possession of the keys to her vehicle, and that she permitted him to drive it so that she could leave the abandoned farm. She asserted that after driving toward town petitioner stopped the vehicle and tried to kiss her. When she resisted, they wrestled and fell out of the car. When petitioner again tried to kiss her, she bit his tongue. She testified that he forcibly pulled off her pants, and she attempted to flee. He tripped her. He asked that oral sex be performed on him and then attempted to have intercourse. The complainant testified that she consented to oral sex in order to avoid further physical injury. Petitioner then left the area on foot.

A state police officer testified regarding interrogation of petitioner. The officer stated that petitioner's story was similar to that of complainant, except that petitioner stated that complainant agreed to perform oral sex and that he had done nothing to force or injure complainant.

The police noticed an unusually large area of matted grass outside the vehicle. Complainant's purse was found under some weeds. The police officers who transported complainant to the hospital testified that she was upset, but noticed no physical injuries. Medical evidence revealed a scrape on her cheek, but no evidence of semen or sperm in complainant's mouth. Other witnesses observed petitioner leaving the scene. They testified that he was walking

casually and did not try to hide or disguise his face from them.

The defense presented no testimony or evidence.

During closing argument the prosecutor noted repeatedly that the evidence was uncontradicted. The prosecutor made the following statements:

1) "The evidence in this case is completely, totally uncontradicted. There are not two types of evidence in this case, there's only one, the testimony of the victim from the witness stand."

2) "Again, did you hear any evidence to the contrary? You heard no other evidence . . . . [The defense attorney] is going to get up here and say, well, this could've been, and that could've been. Well, could've been didn't take the stand. The evidence that you have is evidence from the witness stand, and not could've been."

3) "Did you hear anybody else get up here and testify? Did you hear anybody else get on the witness stand, one of the other people at the bar, and say, well, yeah, Pam.

She was pretty blasted . . . . No, there's no other evidence, none."

4) "The evidence shows, ladies and gentlemen, that about 4:00 a.m. on August 6, 1982 that young man right there raped that young lady right there, and there is no other evidence. It's uncontradicted, it's unrebutted."

Defendant's objection to the above remarks was noted without comment. Prosecution's rebuttal argument included the following:

> "If [the victim] told you the truth about what happened, the defendant is guilty, and there is no other evidence to contradict what she said . . . . What she said is evidence that's uncontradicted, and it's backed up. The defense attorney thinks if he says I haven't produced any corroboration often enough you folks might come to believe it. But do we have corroboration? Do we have evidence there was a struggle? He didn't want to talk about it, but you bet we do."

The district court found that the prosecutor's statements were not "manifestly intended" to reflect on

petitioner's decision not to testify, and that curative instructions given as part of the charge to the jury corrected any error that might have been committed.

II. Privilege Against Self-Incrimination

The fifth amendment provides that "no person . . . shall be compelled in any criminal case to be a witness against himself . . . ." It is well settled that direct reference by a prosecutor to a criminal defendant's failure to testify is a violation of the defendant's privilege against compelled self-incrimination. Griffin v California, 380 U.S. 609 (1965). When viewing the constitutionality of indirect references by the prosecutor to the defendant's failure to testify, this court must examine four factors:

1) Were the comments 'manifestly intended' to reflect on the accused's silence or of such a character that the jury would 'naturally and necessarily' take them as such;

2) were the remarks isolated or extensive;

3) was the evidence of guilt otherwise overwhelming;

4) what curative instructions were given and when.

Hearn v Mintzes, 708 F.2d 1072, 1077 (6th Cir. 1983); accord Spalla v Foltz, 788 F.2d 400, 404 (6th Cir. 1986). The court will not find manifest intent if some other explanation for the prosecutor's remarks is equally plausible. United States v Robinson, 651 F.2d 1188, 1197 (6th Cir. 1981). Whether the jury would "naturally and necessarily" construe the comments to reflect on the defendant's failure to testify requires "a probing analysis" of the context of the comments,

and the likely effect of the trial court's curative instruction. Id.

A "probing analysis" of the record in this case gives rise to our conclusion that the prosecutor's remarks were manifestly intended to call attention to petitioner's failure to testify, or at least that the remarks would have been so construed by the jury. The State argues that the remarks were intended to address defense counsel's unfulfilled promise in its opening statement that contradictory evidence would be forthcoming, so that the jury would be able to distinguish properly between mere comments and actual evidence. The State further urges that the remarks were not offensive, as witnesses besides petitioner could have provided contradictory evidence.

We find the State's first argument inadequate. While it is a legitimate end

for the State to inform the jury that defense counsel's opening statement ought not to be considered as evidence, this prosecutor went too far. Instead of narrowly tailoring his remarks to address defense counsel's statement, the prosecutor here broadly stated more than once that the evidence was uncontradicted. We further observe that, giving defense counsel the benefit of the doubt, he may have made the opening statement in all good faith, intending to put the defendant on the stand, only to decide later when the prosecution rested that its case was too unsubstantial to require a response.

This case is distinguishable from Lockett v Ohio, 438 U.S. 586 (1978), where the State's reference to its evidence as "uncontradicted" was held to be proper in light of defense counsel's express promise that defendant would testify. In Lockett,

the Court reasoned that the prosecutor's remarks added nothing to the impression already made by defense counsel. Here, defense counsel did not promise that petitioner would testify and in fact prepared jurors during voir dire for petitioner's silence by telling them that petitioner did not need to testify and that their decision was not to be influenced by an election not to testify. The court excused one juror who thought otherwise.

Butler v Rose, 686 F.2d 1163 (6th Cir. 1982) (en banc), is also distinguishable. In Butler, a petition for habeas corpus relief based on two prosecutorial comments was denied. In the first comment, the prosecutor noted that the defense attorney must at least present a witness to convince the jury that the complainant was

lying.[1] The other statement was clearly focused on the argument and strategy of defense counsel.[2] While two of the comments in question in the case before us were seemingly targeted at defense counsel's statements, the other three were not. The comment that "could've been didn't take the stand" and the remark made during the State's rebuttal addressed defense counsel's speculation as to events

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[1]The State's Attorney stated, "He cannot do this and just get back and have an attorney say, 'Ah, she is just not telling the truth.' Without producing one witness to show why she might be telling otherwise or how she might be telling otherwise." Id. at 1167.

[2]The State's Attorney stated, "Apparently what [defense counsel] is saying is that in a rape case we are just going to always say it is just made up and put on no proof to show why it was made up or anything to indicate the witness is lying in any way and then you just can't convict, couldn't convict in any rape case." Id. Defense counsel's objection was noted, and specific curative instructions were given. Id.

and defense's claim that the State lacked corroborating evidence. However, in the context of a trial where three other statements unjustifiably illuminated defendant's failure to testify, these two comments served to draw further attention to a subject that had already been presented impermissibly. Defense counsel here made no promises to present a case; the jury was not told that defendant would be expected to testify, as it was in Butler. Unlike Butler and Lockett, the prosecutor's comments in this case add significantly to the impression that petitioner's silence was of consequence. Any impression petitioner might unilaterally have given, beyond the inescapable effect of his silence, was minimal.

Similarly, United States v Robinson, 108 S. Ct. 864 (1988), is not controlling.

In Robinson, defense counsel argued that the government did not allow the defendants to explain their actions. The prosecutor's comment that defendants could have testified was deemed a proper reference to "the possibility of testifying as one of several opportunities which the defendant was afforded, contrary to the statement of his counsel, to explain his side of the case." Id. at 869. Conversely, in the present case, defense counsel makes no assertion that petitioner wished to explain his case or that he was denied the opportunity to do so.

The State's second argument, that no violation has occurred because witnesses other than petitioner could have contradicted the evidence, is equally unconvincing. First, we note that because

only the complainant and petitioner were present at the time of the alleged rape, only petitioner could have rebutted the evidence that "about 4:00 a.m. on August 6, 1982, that young man right there raped that young lady right there." If evidence that the prosecutor labels as uncontradicted could only have been contradicted by the defendant's testimony, that label is much more objectionable. Raper v Mintzes, 706 F.2d 161, 165 (1983). We also note in this regard that the evidence was in fact contradicted to some extent by petitioner's police statement which was admitted during the State's case in chief. Therefore, the prosecutor's assertion that evidence was unrebutted was not substantiated and would more likely serve to highlight the defendant's failure to take the stand. The State has failed

to show an adequate alternate interpretation for the offending comments; therefore, we conclude that as a whole they were manifestly intended to reflect petitioner's silence, and had that effect.

The other three factors set forth in Hearn v Mintzes, supra, also favor petitioner. The five remarks were extensive, not isolated. See Raper, supra, at 167 n.5. Furthermore, one of the remarks was made subsequent to defense objection.

As is hereinafter indicted, we do not feel that evidence of guilt was otherwise overwhelming. Although corroboration of complainant's testimony was not necessary in order for the jury to convict, a single complainant's testimony, which of course the jury was free to disbelieve, is far from overwhelming.

No curative instructions were given at the time of defense's objections. The trial judge generally charged the jury at the end of the trial that a defendant need not testify or produce any evidence, and that the defendant's silence was not to influence their decision. The judge did not mention the prosecutor's improper comments.

III. Harmless Error

In Eberhardt v Bordenkircher, 605 F.2d 275 (6th Cir. 1979), this court articulated the rule to be applied in determining whether a Griffin v California, supra, error is harmless:

> Harmless error, in the context of a violation of a constitutional right of a defendant, is an extremely narrow standard, permitting the State to avoid the retrial of a defendant only when it can demonstrate beyond a

> reasonable doubt that the error did not contribute in any way to the conviction of the defendant. Chapman v California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

Eberhardt at 278. This court must consider whether this is a case in which, "absent the constitutionally forbidden comments, honest, fair-minded jurors might very well have brought in not-guilty verdicts." Chapman, 386 U.S. at 25-26.

Although the State's case was certainly strong enough to permit a jury to find petitioner guilty, it has failed to demonstrate beyond a reasonable doubt that the constitutional error was harmless. In order to find petitioner guilty, the jury necessarily believed that the testimony of complainant, who admittedly lied about her age in order to be served drinks, was credible. The jury must also have doubted the truth of

petitioner's police statement, in which he admitted to sexual contact but claimed to have had the complainant's consent. We conclude that the repeated emphasis by the State regarding petitioner's failure to testify might have persuaded the jury to discredit his statement. Other actions of petitioner, such as showing complainant his driver's license early in the evening and making no efforts to conceal himself immediately following the incident, might also be construed by reasonable jurors as evidence of petitioner's innocence. Uncorrected inferences by the State that petitioner should have taken the stand if he wanted to maintain his innocence could easily have persuaded jurors to discount any doubts that may have arisen due to petitioner's seemingly inconsistent actions.

The State has not demonstrated that the error in this case was harmless beyond a reasonable doubt. Accordingly, we reverse the decision of the district court and remand for entry of an order granting the writ of habeas corpus, unless a new trial is commenced within a reasonable time to be determined by the district court.

BOGGS, Circuit Judge, dissenting. I am in general agreement with Judge Peck's analysis of the violation of the defendant's privilege against self-incrimination. While the prosecutor's remarks were not wholly gratuitous, a careful examination of the factors set forth in Hearn persuades me that the remarks did violate defendant's rights, and that the prosecutor should not have engaged in this line of rhetoric. However, I disagree with the court's harmless error analysis.

An examination of the issue of harmless error always presents a somewhat speculative undertaking. It is always conceivable that any factor may have affected the jury's deliberation. However, over the years courts have developed a number of guideposts in

undertaking a task which essentially involves looking into the minds of the jurors to examine the evidence with an eye to whether a decision might have been influenced by impermissible conduct. I agree with Judge Peck's quotation of the standard from Chapman as to determining whether this is a case in which "absent the constitutionally forbidden comments, honest, fair-minded jurors might very well have brought in not-guilty verdicts." 386 U.S. at 25-26. For the reasons I will set forth below, I believe that there is no reasonable doubt that the same honest, fairminded jurors who convicted Lent would not also have convicted him in the absence of the prosecuotr's impermissible arguments.

This was essentially a case of the victim's word against the defendant's but

with a number of corroborative physical elements of evidence. The prosecution had the direct testimony of the victim, and there was no question as to the identity of the other party to the events, only as to the exact nature of the events. If the jury believed the complainant, the case was essentially over.

The jury had ample opportunity to observe the victim's demeanor and truthfulness. She was vigorously cross examined on the obvious grounds of her conduct earlier in the evening, including going to a bar (albeit a campus bar), lying about her age to obtain alcohol, and leaving the bar, taking with her in her car a man she had just met.[1] While these events may have been unwise, they

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[1]Her girlfriend and defendant's friend went in defendant's car, all in search of a supposed party. The four young people intended to meet again at the party.

constitute no defense to a charge of rape, if the victim's version of the events is believed.

The victim's version was particularly corroborated by the following physical items:

(1) there was testimony and medical evidence as to physical damage to her face, though defendant's statement, as related by the police, was that he never injured her;

(2) a police officer indicated that, in his opinion, the condition of the grass around the car was more consistent with a struggle than with a consensual sexual encounter.

(3) her ear was ripped and bloody and her earring was missing;

(4) the victim's purse was found under the matted grass outside the car, inconsistent with a consensual encounter; and

(5) the victim's story emphasized that her conduct was motivated by a desire to maintain her virginity, and that virginity was confirmed by medical evidence.

Thus, the prosecution's case was direct and well supported, if the jury found the victim credible. The jurors obviously did, as it would have been easy to return a not-guilty verdict had they had significant doubts as to her version of the events. In short, defendant's decision not to take the stand, and the prosecution's impermissible comments on it, would not seem to add much to the weight of the prosecution's case.

I would agree that this is not a case in which the evidence could be termed "overwhelming," as it might be in some cases with numerous neutral eyewitnesses and scientific identification testimony. At the same time, the harmless error analysis must also focus on the weightiness of the particular error. Comment on failure to take the stand might

be more damaging in an alibi defense rather than where, as here, a straight-forward swearing contest is involved. Defendant's version of the events was before the jury through the police officer's statement. His decision not to display his own demeanor to the jury had to be extremely obvious to the jury independent of any prosecutorial comments.

It is also important to note that the defense attorney's argument to the jury directly contradicted the defendant's statement as relayed by the police officer. According to the police officer, Lent agreed that penetration had occurred, but that it has been wholly consensual and no injury had been inflicted. The defense counsel specifically said in the opening statement that there had been "petting,

making out or whatever," with no reference to sexual contact, and that after the victim bit the defendant's tongue because of his persistent advances:

> Greg, probably feeling the effects of alcohol, as was Miss Thering, overreacted and struck, slapped Miss Thering one time across the right cheek. Following that a scuffle ensued between the two. That is probably when the earring--the injury to the ear. Following the scuffle, Greg got up, and he proceeded to walk along Lincoln Road towards his home.

In other words, the defense opening statement account was completely inconsistent with the contemporareous account of the defendant as related by the police officer. This inconsistency also makes it much less likely that the jury was motivated by the prosecution's improper remarks rather than by the strength of its case and the implausibility of the defense.

I also wish to comment on the point made in the majority's opinion that the jury would have had to struggle with "doubts" that may have arisen due to petitioner's seemingly inconsistent actions. These actions are presumably the matters referred to at page 21: that defendant had originally shown the victim his driver's license, and that he was seen by others leaving the scene in a casual manner, without trying to conceal his identity.[2] It is true that these pieces of evidence are more consistent with what has become known as "acquaintance rape" than with the more lurid image of a random attack by a stranger on the street

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[2]In fact, he was walking on the side of a rural road at 4 A.M. on a cold night with no shirt on. The fact that he did not attempt to conceal himself from passing motorcyclists is hardly a powerful rebuttal of guilt.

or at home. However, those items of evidence are in no way inconsistent with the victim's version of events, which the jury believed. Neither do they mitigate the ultimate seriousness of the crime.

The fact that there was some evidence which "might also be construed by reasonable jurors as evidence of petitioner's innocence" (page 21) does not terminate the harmless error analysis. In every case, there is some evidence which if believed (favorable to the defense) or disbelieved (favorable to the prosecution) could lead to acquittal. The question is rather how those credibility judgments and juror judgments interact with the constitutional violation. In this case, I am firmly persuaded that the jury's analysis of the facts which led to their guilty verdict did not depend on any

additional discounting of defendant's arguments (offered either through the police or through defense counsel) caused by the prosecutor's "piling on" about the failure to testify.

Finally, I would note that an analysis of cases in which this particular constitutional violation is alleged reveals an almost complete absence of cases in which a conviction has actually been reversed. Out of some 50 cases I have examined in which a constitutional violation was considered, only two convictions were actually overturned. In Raper v Mintzes, 706 F.2d 161 (6th Cir. 1983), this court considered a murderous attack in the home on a recently separated women, her new boyfriend and two of the boyfriend's children. Only the boyfriend survived. By a 2-1 vote, the court upheld

the district court's grant of habeas corpus on the conviction for the first degree murder of the defendant's wife, but affirmed the other convictions of second-degree murder of the children and assault with intent to murder the boyfriend. Id at 167. The prosecutor's comments as to the failure to explain what was in the defendant's mind were particularly egregious because of the importance of mental state in first degree murder. Id at 163.

In Hearn v Mintzes, 708 F.2d 1072 (6th Cir. 1983), the court reversed a conviction in another "acquaintance rape" situation. However, an examination of the facts in that case highlights the differences that would make the error here harmless beyond a reasonable doubt. In that case, the complainant's conduct after

the charged events gave reason to doubt her credibility. She told someone the night of the assault that she was "knocked down" with no mention of forced sex; the next day she told her employer that she was assaulted in an elevator, and when she first reported it to the police, she did not mention sexual contact. Id. at 1074. The defense also introduced five photographs of "an outwardly relaxed 'complainant' seated in the proximity of a door to the hallway, with a highball in her hand." Ibid. The court emphasized that "the testimony of [complainant] was in many respects inconsistent; other witnesses strongly suggested that [complainant] knew [defendant] and willingly went to his apartment after embracing him in the hall." Id. at 1078.

Thus, the victim was far less credible than in the present case.

Rape under circumstances such as these can easily be disbelieved, and convictions are not easy to obtain. The victim's degree of credibility is demonstrated by the fact that a conviction resulted. See Estrich, Rape, 95 Yale L.J. 1087, 1143 (1986). In our case, the substantial physical evidence verifying the victim's story of a forceable assault and the contradictions in the defense version of events all point to an error that was harmless here, as opposed to the errors in the two cases above. I would affirm.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NO: 87-2121

GREGORY LENT,

Petitioner-Appellant,

v

H. GARY WELLS,

Respondent-Appellee.

Before: WELLFORD AND BOGGS, Circuit Judges; and PECK, Senior Circuit Judge.

J U D G M E N T

ON APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby reversed and the case is remanded for entry of an order granting the writ of habeas corpus, unless a new trial is commenced within a reasonable time to be determined by the said district court.

No costs taxed.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

__S_____
Clerk

Issued as Mandate: December 14, 1988

A True Copy.

COSTS: NONE

Attest:

Filing fee . . . . $
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Total . . . . $

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Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

GREGORY LENT,

Petitioner,

v

CIVIL ACTION NO:
86CV-10387-BC

H. GARY WELLS,

Respondent.
_____/

MEMORANDUM OPINION AND ORDER

The Petitioner, Gregory Lent, who is a prisoner at the Muskegon Correctional Facility in Michigan, has filed this petition for writ of habeas corpus pursuant to 28 U.S.C. §2254. He was convicted on November 3, 1983, by an Isabella County Circuit Court jury of first degree criminal sexual conduct, Mich. Comp. Laws §750.520b(1)(f). He pled guilty as a second offender and was sentenced to a term of ten to fifteen years imprisonment.

The Michigan Court of Appeals affirmed the conviction in a Per curiam opinion dated September 18, 1985. Docket No. 76339. On April 28, 1986, the Michigan Supreme Court denied leave to appeal in a standard order. Docket No. 77459.

The habeas petition raises only one claim challenging the validity of Petitioner's conviction. State court remedies concerning this issue have been exhausted. See Picard v Connor, 404 U.S. 270 (1971); Anderson v Harless, 459 U.S. 4 (1982).

The Petitioner's sole habeas claim is that his Fifth Amendment rights were violated when the prosecutor, in closing and rebuttal argument, improperly commented upon Petitioner's failure to testify at trial. Specifically, he claims that the prosecution improperly argued

that there was no conflicting defense evidence or testimony rebutting the prosecution's case in chief. At trial, the defense presented no evidence and called no witnesses. The victim, Pamela Thering, testified that Petitioner forced her to perform oral sex upon him.

Neither a prosecutor nor a trial judge may comment upon a criminal defendant's failure to testify. Griffin v. California, 380 U.S. 609 (1965). If a prosecutor directly comments on the failure to testify, a Fifth Amendment violation has occurred unless it can be demonstrated that the prosecutorial error was harmless. Raper v Mintzes, 706 F2d 161, 164 (6th Cir 1983). When a prosecutor indirectly comments on a criminal defendant's failure to testify, the habeas court must conduct a analysis

of the comments in their proper context to determine "[w]hether the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." Butler v Rose, 686 F2d 1163, 1170, (6th Cir. 1982) (en banc). In this case, the prosecutorial comments were indirect. Therefore, the court must "determine whether the comments violated the Fifth Amendment under the Butler v Rose, supra test. Spalla v Foltz, 788 F2d 400, 404 (1986). In making such a determination, consideration of the four factors set forth in Hearn v Mintzes, 708 F2d 1072, 1077 (6th Cir. 1983) must be made:

1. Were the comments "manifestly intended" to reflect the accused's silence or of such a character that the jury "naturally and necessarily" would take them as such;

2. Were the remarks isolated or extensive;

3. Was the evidence of guilt otherwise overwhelming; and,

4. What curative instructions were given and when.

Petitioner cites four prosecutorial comments made during closing arguments as violative of the Fifth Amendment:

> . . . . I'd like to discuss what I'd urge you to do. The evidence in this case is completely, totally uncontradicted. There are not two types of evidence in this case, there's only one, the testimony of the victim from the witness stand. Now we do have statements made by the defendant, and we do have three versions. At this point in the trial we have three possible versions of what happened that you may consider. See T. pg. 412).
>
> She acted just like a person who was frightened. Again, did you hear any evidence to the contrary? You heard no other evidence. The judge is going to talk to you about reasonable doubt, and not based on conjecture or speculation. But that's what the defense attorney is going to want you to do. He's going to get up here and say, well, this could've

been, and that could've been. Well, could've been didn't take the stand. The evidence that you have is evidence from this witness stand, and not could have beens. She finally, because the defendant tells her to, gives him the keys to the car. Again, is that borne out by the evidence? Yes, that's what the defendant tells the police. See T. pgs. 421-422.

She only went because her friend asked her to. What happened to her? She got raped. She got Raped. Again, who does the evidence back up? Did you hear anybody else get up here and testify. Did you hear anybody else get up here and testify? Did you hear anybody else get on the witness stand, one of the other people from the bar, and say, well yeah, Pam. She was pretty blasted. . . . No, there's no evidence, none. See T. pg. 425.

His wife and child. The defense attorney talked about them in opening statement. From the evidence, the defendant wasn't talking about those two people on the night in question. The evidence shows, ladies and gentlemen, that about 4:00 o'clock A.M. on August 6, 1982 that young man right there raped that young lady right there, and there is no other evidence. It's uncontradicted, it's unrebutted. Because of that. . .take a look at

> all these other lesser charges. The defendant penetrated her by his own admission, and by what the victim told you. See T. pg. 428.
>
> If Pamela Thering told you the truth about what happened, the defendant is guilty, and there is no other evidence to contradict what she said. Speculation, theory, what the defense attorney thinks, those are not evidence. What I think isn't evidence. What she said is evidence that uncontradicted, and it's backed up. The defense attorney thinks if he says I haven't produced any corroboration often enough you folks might come to believe it. See T. pgs. 447-448.

The Court concludes that the prosecutorial comments were not "manifestly intended" to reflect on the Petitioner's election not to testify. "Manifest intent will not be found 'if some other explanation for his [the prosecutor's] remark is equally plausible.'" Steele v Taylor, 684 F2d 1193, 1204 (6th Cir. 1982), cert denied, 460 U.S. 1053 (1983), quoting United

States v Robinson, 651 F2d 1188, 1197 (6th Cir. 1981), cert denied, 454 U.S. 875 (1981). The comments were arguments on the evidence and made partially in response to defense counsel's opening statement that the evidence would be insufficient to convict because the victim's testimony would be uncorroborated. In his opening statement, defense counsel also led the jury to believe that the defense would be presenting a defense. See T. pg. 213, 216. The prosecution's argument was plausibly in response to what defense counsel had already stated to the jury.

Although there were five alleged instances of prosecutorial comment on Petitioner's silence, the remarks were isolated and not overly extensive. Furthermore, the evidence of guilt was not

weak and the court gave curative instructions as part of the ordinary jury instructions. See T. pgs. 454-455. Therefore, the prosecutorial comments, viewed in light of their context, and considering the four Hearn factors, do not constitute a Fifth Amendment violation upon which habeas relief may be granted. Accordingly,

IT IS ORDERED that the petition for writ of habeas corpus is DENIED.

JAMES P. CHURCHILL
UNITED STATES DISTRICT JUDGE

DATED: October 19, 1987

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

GREGORY LENT,

Petitioner,

v

FILE NO:
86CV-10387-BC

H. GARY WELLS,

Respondent.
_____/

J U D G M E N T

Pursuant to the Memorandum Opinion and Order bearing this date,

IT IS ORDERED AND ADJUDGED that the Petition for Writ of Habeas Corpus be, and the same hereby is DENIED.

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JAMES P. CHURCHILL
UNITED STATES DISTRICT COURT

Dated: October 19, 1987

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 28th day of April, in the year of our Lord one thousand nine hundred and eighty-six.

Present the Honorable

G. MENNEN WILLIAMS,
Chief Justice

CHARLES L. LEVIN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
DOROTHY COMSTOCK RILEY,
DENNIS W. ARCHER,
Associate Justices

77459

PEOPLE OF THE STATE MICHIGAN,

Plaintiff-Appellee,

v

SC: 77459
CoA: 76339
LC: 82-3589-FY

GREGORY BYRON LENT,

Defendant-Appellant.

On order of the Court, the delayed application for leave to appeal is

considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

0422

STATE OF MICHIGAN -- ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this __28th_ day of __April_ in the year of our Lord one thousand nine hundred and eighty-six.

___S_____ Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v Docket No: 76339

GREGORY BYRON LENT,

Defendant-Appellant.

BEFORE: R.M. Maher, P.J., and Allen and R.E. Robinson*, JJ.

PER CURIAM

Defendant appeals as of right from a jury conviction of first degree criminal sexual conduct, MCL 750.520b(1)(f); MSA 28.788(2)(1)(f) and from a plea-based conviction as a third felony offender, MCL 769.11(1)(b); MSA 28.1083(1)(b). He was sentenced to 10 to 15 years imprisonment.

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*Retired Circuit judge, sitting on the Court of Appeals by assignment.

Defendant first argues that the trial court improperly denied his motion for a directed verdict on the first degree criminal sexual conduct charge because there was insufficient evidence of the element of personal injury. We find that the trial court properly denied the motion as there was sufficient evidence from which a rational trier of fact could find that the element was proven beyond a reasonable doubt. People v Hampton, 407 Mich 354; 285 NW2d 284 (1978). There was evidence that the complainant's face and arms were bruised and swollen, that her face was scratched, and that her ear was torn. This is sufficient. People v Smith, 128 Mich App 361, 366; 340 NW2d 855 (1983).

Defendant next argues that the prosecutor improperly commented upon the lack of evidence contradicting the

complainant's testimony. Defendant presents this argument both as a matter of state statutory and federal constitutional law, contending that the prosecution's repeated claims that the complainant's testimony was "uncontradicted" constituted an indirect comment on defendant's election not to testify. We agree that, at first glance, the prosecutor's closing arguments appear to violate Michigan law as expressed in People v White, 401 Mich 482, 511-512; 257 NW2d 912 (1977), People v Mancill, 393 Mich 132; 223 NW2d 289 (1974), and People v Payne, 131 Mich 474, 480; 91 NW 739 (1902), and federal law as expressed in Hearn v Mintzes, 708 F2d 1072 (CA 6, 1083), Raper v Mintzes, 706 F2d 161 (CA 6, 1093), and Butler v Rose, 686 F2d 1163 (CA 6, 1982). However, after carefully examining the record, we find

that the prosecutor's comments were not manifestly intended to comment on defendant's election not to testify, but were instead intended to deal with defense counsel's opening statement. In that statement, defense counsel directly stated that "[o]nly two people know exactly what happened, Gregory Lent and Miss Thering". Counsel also related a version of the events which he expected would be proven during trial. This version of events could only have come from defendant as it concerned intimate details of the actual altercation between the complainant and defendant and obviously was not presented from the complainant's point of view. This, it was defense counsel who, in effect, called attention to defendant's subsequent failure to testify. See

Lockett v Ohio, 438 US 586; 98 S Ct 2954; 57 L Ed 2d 973 (1978). Furthermore, we do not believe that under these circumstances the jury "naturally and necessarily" would have taken the prosecutor's argument to be a comment on the failure of defendant to testify. Butler v Rose, supra, 686 F2d 1170. Finally, we note that defense counsel indicated during voir dire that defendant might not take the stand and informed the jurors that they were not to consider this fact in reviewing the evidence, and that the trial court explicitly instructed the jurors that they were not to consider this fact or the attorney's arguments as evidence. We find that his case closely parallels the recently decided case of Spalla v Foltz, _____ F Supp _____ (ED Mich, Civil Action No. 84-CV-2425-DT, rel'd July 15, 1985),

and follow that decision in affirming defendant's conviction on this issue.

Defendant next argues that he was denied a fair trial because the prosecutor requested the presence of the complaining witness in a prior prosecution for criminal sexual conduct of a different defendant during defendant's trial. After reviewing the record and the parties' briefs, we are convinced that the trial court scrupulously and adequately protected defendant's right to a fair trial. The court admonished the prosecutor (who appeared to be lacking in sensitivity to defendant's interests) and conducted an unusual post-verdict voir dire of the three jurors most likely to have been influenced by the presence of the complaining witness. Defendant argues that this was inadequate as the other nine jurors might have been "tainted" as well.

However, in light of the comments of the three most vulnerable jurors to deliberations of the jury as a whole and the purely speculative nature of defendant's argument as to these jurors, we find that this argument is without merit.

Defendant also argues that the trial court abused its discretion by denying defendant's motion to empanel a new jury for consideration of the habitual offender charge. We disagree. The court carefully weighted the cost and inconvenience of empaneling a new jury against the possibility of prejudice to the defendant. People v Stratton, 13 Mich App 350; 164 NW2d 555 (1968).

Affirmed.

/s/ Richard M. Maher
/s/ Glenn S. Allen, Jr.
/s/ Richard E. Robinson